United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7551

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FOR THE SECOND CIRCUIT

Docket No. 76-7551

PHILO SMITH & CO., INC. and JAMES E. RUTHERFORD,
Plaintiffs-Appellants,

against

USLIFE CORPORATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS

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Preliminary Statement

In this action, plaintiffs-appellants, Philo Smith & Co., Inc. ("PS&Co.") and James E. Rutherford ("Rutherford"), seek to recover a finder's fee for services rendered to defendant-appellee USLIFE Corporation ("USLIFE") in connection with its acquisition of All American Life & Financial Corporation ("All American"). Plaintiffs demanded a trial by jury of their claim and trial commenced on September 14, 1976. On September 20, 1976, however, the District Court (Tenney, D. J.) granted USLIFE's oral motion for a directed verdict, made at the close of plaintiffs' evidence on September 17, and dismissed the complaint. On September 24, 1976, the District Court filed a memorandum opinion, which has not been reported, setting forth the basis for this bench order. [JA at 128-44].* Final judgment on that order was entered on September 30, 1976. [JA at 145]. PS&Co. and Rutherford appeal from that final judgment.

*"JA" refers to the Joint Appendix to the Briefs.

Statute Involved

The statute involved in this appeal is Section 5-701(10) of the New York General Obligations Law, *i.e.*, the New York Statute of Frauds governing finders' fees. This statute is printed at the end of this brief.

Question Presented

Did the District Court err in directing a verdict for defendant by (1) requiring plaintiffs to prove facts unnecessary under New York law to their recovery; (2) finding that plaintiffs had failed to establish facts clearly proven by the testimony at trial; and (3) drawing inferences which were properly for the jury to determine and which it did not treat in the light most favorable to the plaintiffs?

In withdrawing plaintiffs' case from the jury's consideration, the District Court committed three basic errors. First, the Court erred as a matter of law by requiring plaintiffs to prove both the elements of estoppel and the elements of common law fraud in order to recover on their claim under a single theory of contract law. Here, the jury need only have found that plaintiffs satisfied the elements of estoppel under New York law. Second, even assuming that plaintiffs were required to prove USLIFE intended to defraud them in order to recover, plaintiffs established the requisite intent. The Court's adverse finding is contradicted by the record. Finally, plaintiffs made a *prima facie* showing of the elements of estoppel under New York law, but the District Court directed a verdict based on inferences which were properly for the jury to determine and which had to be treated most favorably to the plaintiffs for the purpose of defendant's motion.

Statement of the Case

The Nature of the Case

Plaintiffs PS&Co. and Rutherford seek to recover a finder's fee of approximately $750,000 for services rendered to USLIFE in connection with USLIFE's acquisition of All American. Plaintiffs' claim rests on two written fee agreements; the oral promises of Gordon E. Crosby, Jr. ("Crosby"), Chairman of the Board and Chief Executive Officer of USLIFE, to extend the agreement; and plaintiffs' compliance with the terms of the agreements as modified by Crosby's oral promises.

The facts upon which the plaintiffs relied to establish their claim were largely undisputed. [JA at 86-93]. The District Court had earlier ruled that plaintiffs were entitled to recover their fee if the testimony at trial, in addition to the undisputed facts, showed that (1) Crosby promised to extend the written agreements if USLIFE were still interested in acquiring All American when the current written agreement expired; (2) Crosby's oral representations were made contemporaneously with or subsequent to the written finders' agreements; (3) USLIFE anticipated reliance by plaintiffs on these oral representations; (4) plaintiffs' reliance on these oral representations was reasonable; and (5) plaintiffs' performance was unequivocally referable to the oral representations upon which plaintiffs relied. In other words, plaintiffs were entitled to recover if they proved the classic elements of estoppel under New York law.

On the second day of trial, however, the District Court informed plaintiffs that they would be required to prove both the elements of common law fraud and the elements of estoppel in order to recover. [Trial Transcript at 110-13.] In substance, the Court ruled that plaintiffs must show that Crosby had a specific intent to defraud them at the times he made his oral promises to extend. This ruling

was wrong as a matter of New York law, but plaintiffs nevertheless presented evidence to show that, when he made these oral promises, Crosby either: (1) had the specific intention not to keep them; or (2) had not considered whether he would fulfill them or not. In addition, plaintiffs' evidence established the elements of estoppel.

In its memorandum opinion granting defendant's motion for a directed verdict, the District Court properly assumed for the purposes of the motion that Crosby had made the oral promises to extend. The Court found, however, that plaintiffs had failed to show that Crosby intended to defraud them. Even assuming that such a finding were required under New York law, the Court's conclusion on this issue is flatly contradicted by the trial transcript. The Court also ruled that plaintiffs had failed to establish that their acts of reliance were "unequivocally referable" to Crosby's oral promises or that they had suffered any "substantial injury" because of their reliance on those promises. Plaintiffs' evidence on these issues was sufficient to permit the jury to consider plaintiffs' case, and defendant's motion for a directed verdict should not have been granted.

The Course of the Proceedings

Plaintiff PS&Co. commenced this diversity action by filing its complaint on March 19, 1974. Defendant USLIFE moved to dismiss this complaint as barred by the New York Statute of Frauds governing finders' fees. The District Court denied this motion on December 20, 1974, and defendant answered the original complaint on January 23, 1975.

On February 13, 1975, defendant again moved to dismiss plaintiff PS&Co.'s complaint, this time for failure to join Rutherford as an indispensable party. Rutherford joined this action as a plaintiff and an amended complaint on behalf of both plaintiffs was filed on March 20, 1975. USLIFE withdrew its motion and answered the amended complaint on April 14, 1975.

On September 14, 1975, six jurors and two alternates were impanelled and sworn, and trial commenced. During the presentation of plaintiffs' case, however, two of the jurors were excused for personal reasons and both alternates were required to sit for the excused jurors. [Trial Transcript at 270-71, 437.] Plaintiffs presented the testimony of Mr. Rutherford on his own behalf, Rodney A. Hawes, Jr. ("Hawes") on behalf of PS&Co., and Crosby as an adverse witness. At the close of plaintiffs' evidence on September 17, 1976, defendant made an oral motion for a directed verdict. The Court reserved decision on the motion at that time, but on September 20, 1976 the Court granted that motion from the bench. At the same time, the Court informed counsel for the parties that trial could not have resumed that day in any event because the sixth juror had failed to appear and was apparently ill. [Trial Transcript at 610.]

On September 24, the District Court filed its memorandum opinion setting forth the basis for its order directing a verdict for defendant and dismissing plaintiffs' complaint. The Clerk of the Court entered final judgment dismissing plaintiffs' complaint on September 30, 1976, and plaintiffs noticed this appeal on November 1, 1976.

Statement of Facts

With certain crucial exceptions, the District Court's memorandum opinion granting the directed verdict accurately recites the facts presented by the plaintiffs at trial. That opinion is reprinted in full in the Joint Appendix to the Briefs [JA at 128-44], and, for the sake of brevity, the District Court's findings will not be repeated here. The Argument section of this Brief, however, presents the evidence showing that certain critical findings by the District Court are wrong.

ARGUMENT

The party seeking a directed verdict must establish that no genuine issues of material fact exist and that reasonable minds could only conclude the opposing party failed to establish the essential elements of his claim. 5A J. Moore, FEDERAL PRACTICE ¶ 50.02 (2d ed. 1975). In deciding a motion for a directed verdict, the District Court must consider the evidence most favorably to the plaintiff, "making due allowance for all reasonably possible inferences" favoring the plaintiff, even though contrary inferences might reasonably be drawn. *Galloway* v. *United States,* 319 U.S. 372, 395 (1943); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.,* 370 U.S. 690, 696 (1962). The credibility of the witnesses may not be weighed by the Court. *Simblest* v. *Maynard,* 427 F.2d 1, 4 (2d Cir. 1970).

In directing a verdict for defendant in this case, the District Court violated these principles in three basic ways. Point I of the Argument shows that the District Court erred as a matter of law in requiring plaintiffs to prove intent to defraud. This is not an element of estoppel under New York law. Even assuming that *scienter* was an element of this case, Point II demonstrates that plaintiffs proved the requisite intent to defraud at trial. The Court's contrary findings are contradicted by the evidence. Finally, Point III shows that the District Court drew inferences from the evidence which were solely for the jury to determine and which were improperly adverse to the plaintiffs.

POINT I

PLAINTIFFS WERE NOT REQUIRED TO ESTABLISH *SCIENTER* IN ORDER TO RECOVER IN THIS ACTION.

In its memorandum opinion and order of December 20, 1974, denying defendant's motion to dismiss plaintiff PS&Co.'s complaint as barred by the New York Statute of

Frauds, General Obligations Law § 5-701(10), the District Court outlined the facts which the plaintiffs would be required to establish in order to recover in this action. That opinion stated:

> "Construing plaintiff's complaint liberally, a claim based on the doctrine of promissory estoppel might be inferred. It could be argued that the following sequence of events occurred: Plaintiff originally agreed to arrange a meeting between All American and USLIFE in expectation of payment should the meeting result in a successful acquisition agreement. The 1971 and 1972 written agreements specified a termination date by which an agreement in principal was to occur. The plaintiff's efforts and money had to be extended in 1971 in anticipation of events its officers could not expect until much later; hence, it was crucial to plaintiff that defendant agree orally to extend the termination dates set forth in the written agreements. Plaintiff alleges that oral extensions were in fact given; that it relied upon those oral promises; and furthermore, that plaintiff saw the second written agreement as evidence that additional extensions would be forthcoming. When plaintiff's officers were skeptical that an acquisition agreement could be reached within the limits of the written agreement, they were reminded by defendant that their original 1971 efforts would be rewarded whenever acquisition was finally agreed upon. This appeared consistent with the undertaking which prompted plaintiff to expend its efforts in the first place.
>
> "It is, of course, subject to proof that the parol representations allegedly relied upon were made contemporaneously with or subsequent to the written agreement, that defendant would anticipate reliance; that plaintiff's reliance was reasonable; and that plaintiff's performance was unequivocally referable to the alleged oral agreement upon which plaintiff claims reliance." [Memorandum Opinion Denying Motion to Dismiss at 7-8].

The District Court's earlier opinion correctly stated the law governing plaintiffs' claim in this action. On the second day of trial, however, the District Court ruled that plaintiffs were required to prove not only the contract elements of estoppel, but also each of the elements of common law fraud in order to recover. Among other things, the Court held that the plaintiffs would be required to establish *scienter, i.e.*, that Crosby intended to defraud plaintiffs when he made his oral promises to extend. No New York authority supports the District Court's ruling; and some New York decisions have estopped a party from relying on the Statute of Frauds even though no *scienter* was shown. *Walter* v. *Hoffman*, 267 N.Y. 365, 196 N.E. 291 (1935); *Imperator Realty Co.* v. *Tull*, 228 N.Y. 447, 127 N.E. 263 (1920). Courts in other jurisdictions have expressly held that a party may be estopped from asserting the defense of the Statute of Frauds without any showing of *scienter*. *Wolfe* v. *Wallingford Bank & Trust Co.*, 124 Conn. 507, 1 A.2d 146 (1938); *Seymour* v. *Oelrichs*, 156 Cal. 782, 106 P. 88 (1909); *Notten* v. *Mensing*, 3 Cal. 2d 469, 45 P.2d 198 (1935); *see also Anderson* v. *Hubble*, 93 Ind. 570 (1883).

In *Imperator Realty Co.* v. *Tull, supra*, plaintiff and defendant entered into a written contract for the exchange of real property. The contract required that plaintiff's property be delivered free of violations of law or ordinances. On the same day the written contract was signed, however, defendant orally agreed to permit plaintiff to deposit sufficient money with the defendant to cure the violations. The New York Court of Appeals held that the defendant's oral representation to the plaintiff estopped defendant from subsequently asserting the Statute of Frauds as a defense, despite the absence of any showing of *scienter*.

In *Wolfe* v. *Wallingford Bank and Trust Company, supra*, the Supreme Court of Connecticut held that, because

the defendant had permitted plaintiffs to improve the property subsequent to defendant's oral promise, plaintiffs' claim for breach of an oral agreement for the conveyance of land was not barred by the Statute of Frauds. The Court rejected defendant's argument that there could be no estoppel absent a specific intent to deceive, saying:

> "[Another] claim of the defendant require[s] but brief mention. [That] is that an actual design or intent to deceive or defraud must exist in the maker at the time of his representation or promise, to afford the basis of an estoppel. The law is not so. In this connection the meaning given to fraud or fraudulent is virtually synonymous with unconscientious or inequitable. The fraud may and generally does consist in the subsequent attempt to controvert the representation and to get rid of its effects, and thus to injure the one who has relied on it, or, as it has been stated, equitable estoppel arises when the conduct of the party estopped is fraudulent in its purpose or unjust in its results. 10 R.C.L. 691, § 20; Seymour v. Oelrichs, 156 Cal. 782, 796, 106 P. 88, 94, 134 Am.St.Rep. 154." 124 Conn. at 517-18, 1 A.2d at 151.

In *Seymour* v. *Oelrichs, supra,* the Supreme Court of California held that proof of *scienter* is not essential to estop a party from invoking the Statute of Frauds. The Court said:

> "The presence of fraud is, of course, essential. It is established by a multitude of cases that to constitute fraud sufficient to serve as a foundation for estoppel by acts or conduct an actual intent to mislead is not essential. Mr. Pomeroy in his work on Specific Performance says that the fraud essential in such cases is not necessarily an antecedent fraud, consciously intended by a party in making the contract, but a fraud inhering in the consequence of thus setting up the statute." 156 Cal. at 796, 106 P. at 94.

In *Notten* v. *Mensing*, *supra*, the trial court sustained defendant's demurrer to a complaint seeking enforcement of a constructive trust on certain property devised to defendants by the will of the deceased. The Supreme Court of California reversed, held that defendants were estopped from invoking the Statute of Frauds, and emphasized that *scienter* is not an essential element of that form of fraud which is necessary to invoke the doctrine of estoppel. The Court stated:

> "In order to raise the estoppel, fraud in some form is essential, but it is not required that an actual intent to defraud or mislead exist; all that is required is that there exist 'a fraud inhering in the consequence of thus setting up the statute.'" (citation omitted) 3 Cal. 2d at 476, 45 P.2d at 202.

The rule established by these cases is precisely summarized by Professor Williston in his treatise. He specifically states that actual intent or design to mislead need not be proved to estop a party from asserting the Statute of Frauds. Instead, the doctrine of estoppel is designed to prevent a fraudulent or unconscionable *result*, and proof of *scienter* is not necessary to achieve that purpose.

> "A court of equity will grant relief where the oral promise was made as a means of imposition and deceit to secure the consideration, but the exercise of its jurisdiction is based not on the oral agreement, but on the fraud.
>
> * * *
>
> "Actual intent or design to mislead is not, however, essential. There need not be a corrupt motive or evil design; it is sufficient if the circumstances are such as to render it unconscionable to deny facts which the party by his silence or representation has caused the other party to believe in and act upon, and the denial of which must operate as a fraud upon him." 3 S. Williston, CONTRACTS § 533A, pp. 799, 801 (3d ed. 1961).

To support the principles stated in his treatise, Professor Williston cites the decision of the New York Court of Appeals in *Walter* v. *Hoffman*, 267 N.Y. 365, 196 N.E. 291 (1935). In that case, the Court held that the defendant was estopped from asserting the Statute of Frauds as a defense to the plaintiff's action on an oral contract for the sale of land on which the defendant had lived for some time, thus depriving plaintiff of its use. The plaintiff made no showing whatever of an intent by the defendant to deceive him. Nevertheless, the Court ruled that the elements of estoppel had been satisfied because the plaintiff's reliance was unequivocally referable to the oral agreement. *Id.* at 369, 196 N.E. at 293.

Following these principles, other New York courts have held that a party may be estopped from asserting the Statute of Frauds without proof of *scienter*. *Wikiosco, Inc.* v. *Proller*, 276 App. Div. 239, 94 N.Y.S.2d 645 (3d Dep't 1949) (citing the decision of the Supreme Court of Connecticut in *Wolfe* v. *Wallingford Bank & Trust Co., supra);* In the *Matter of Rosenbaum-Grinnell, Inc.*, 15 Misc. 2d 450, 182 N.Y.S.2d 441 (Sup. Ct. N.Y. Co. 1958).

In analogous cases, the New York Court of Appeals has repeatedly held that intent to defraud is not an element of estoppel. *Triple Cities Construction Co.* v. *Maryland Cas. Co.*, 4 N.Y.2d 443, 176 N.Y.S.2d 292, 151 N.E.2d 856 (1958); *Romano* v. *Metropolitan Life Ins. Co.*, 271 N.Y. 288, 2 N.E. 2d 661 (1936); *Syracuse Light Co.* v. *Maryland Cas. Co.*, 226 N.Y. 25, 122 N.E. 723 (1919); ***Blair*** **v.** ***Wait,*** 69 N.Y. 113, 37 N.Y.S. 588 (1877); *Continental National Bank* v. *National Bank*, 50 N.Y. 575, 20 N.Y.S. 1002 (1872).

In *Triple Cities Construction Co.* v. ***Maryland Cas. Co.,*** *supra*, for example, the Court of Appeals made it clear that an estoppel arises even from innocent representations upon which another relies, saying:

> "An estoppel, this court has said, 'rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to

> his injury.' (*Metropolitan Life Ins. Co.* v. *Childs Co.*, 230 N.Y. 285, 292; *Lynn* v. *Lynn*, 302 N.Y. 193, 205.) Indeed, 'A party may not, even innocently, mislead an opponent and then claim the benefit of his deception.' (*Romano* v. *Metropolitan Life Ins. Co.*, 271 N.Y. 288, 293; see, also, *Syracuse Light Co.* v. *Maryland Cas. Co.*, 226 N.Y. 25, 36)." 4 N.Y. 2d at 448, 176 N.Y.S.2d at 295, 151 N.E.2d at 858.

In *Romano* v. *Metropolitan Life Ins. Co., supra,* cited by the Court in the *Triple Cities* case, *supra,* plaintiff commenced an action to recover under an insurance contract by serving a summons without complaint. By its terms, the policy became "incontestable after it has been in force for a period of two years from its date of issue. . . ." 271 N.Y. at 290. After seeking and obtaining several extensions of time, counsel for the insured served a complaint on the defendant insurer when it was too late for the insurer to contest the validity of the policy. Holding that the plaintiff was estopped from asserting the contract term as a defense to the insurer's claim of invalidity, the Court of Appeals took pains to state that the plaintiff's good faith and lack of any intent to deceive did not change the result. The Court said:

> "Even should it appear that the requests for an extension of time to serve the complaint were made in good faith and without intent to trap the insurance company into abandonment of its defense, the fact would still remain that the company was induced by that request to refrain from beginning its contest of the validity of the policy within the time limited by the policy, and that the plaintiff or her attorney should have known that compliance with that request would naturally, if not indeed inevitably, lead to that result. In such case the courts should give proper effect to the acts and words of the parties, and place responsibility for the non-performance of the condition of the policy upon the plaintiff who induced it." 271 N.Y. at 294, 2 N.E.2d at 664.

In *Syracuse Lighting Co.* v. *Maryland Cas. Co., supra,* the defendant insurer refused to pay a judgment entered against its insured and initiated a protracted exchange of correspondence in defense of its position. As a result, the time within which plaintiff could bring an action against the insurer under the policy expired. The Court of Appeals carefully distinguished between claims of fraud and estoppel and held that defendant was estopped from asserting the contract term as a defense, even though the insurer "did not intend to refuse to pay plaintiff" at the time of the negotiations. The Court stated:

> "To determine that defendant had not waived the provision of the policy as to the limitation of time and was not estopped from asserting the same as a defense would impute to it a fraudulent intent to lull the plaintiff into inactivity, induce it to continue negotiations until after the expiration of the thirty days and thereby secure the opportunity to later interpose a defense which it considered impregnable. The conduct of defendant was such as to permit the trial justice to find that defendant with full knowledge of all the facts and of its rights under the policy contract prepared by it, particularly the provision therein limiting the time within which an action against it should be commenced, did not intend to refuse to pay plaintiff the indemnity provided for in the policy or to urge any defense to an action to recover the same, save only the one stated by it, the non-existence of any contractual relation with plaintiff or a right in plaintiff to make a claim against it by reason of such policy, and to abandon its right to urge the particular defense of limitation of time, now sought to be enforced. The finding that such waiver was made estops defendant from now asserting the defense of limitation of time.
>
> "The plaintiff was justified in a belief that defendant would deal fairly and honestly with it, and we may presume from the facts in this case that defendant's

> intention was to so treat with plaintiff rather than to commit an injustice or fraud, and to waive the provision of the policy as to limitation of time, which it was at liberty to do." 226 N.Y. at 35-37, 122 N.E. at 726-27.

None of the cases relied upon by the District Court to support its ruling held that *scienter* must be proved to estop a party from asserting the Statute of Frauds. *Sawyer* v. *Sickinger,* 47 App. Div. 2d 291, 366 N.Y.S.2d 435 (1st Dep't 1975), for example, dealt only with part performance in a case involving the Statute of Frauds provision governing contracts which cannot be performed within one year. The correspondence between the parties showed that they had never reached any agreement on the transaction at issue. Plaintiff could not prove any of the proper elements of estoppel because defendant had not induced plaintiff to rely on any oral promise. The Court held that, for claims involving this kind of situation, some form of fraud must be proved by the plaintiff unless he can show full performance by both parties. In reaching this result the Court relied on the section of Professor Williston's treatise, quoted above, which states that *scienter* is not an element of the fraud necessary to establish an estoppel.

In *Bulkley* v. *Shaw,* 289 N.Y. 133, 44 N.E.2d 398 (1942), the plaintiff sued on an oral contract barred by the Statute of Frauds. He did not claim that parol representations had varied the terms of a written agreement and induced his reliance. Finally, in *Wagner* v. *Manufacturers' Trust Co.,* 237 App. Div. 175, 261 N.Y.S. 136 (1st Dep't), *aff'd,* 261 N.Y. 699, 185 N.E. 799 (1932), the Court said that estoppel could be shown by "proof of such facts as would repel the inference of fair and honest conduct on [defendant's] part." 237 App. Div. at 178, 261 N.Y.S. at 140.

In summary, the cases and commentators are in accord: *scienter* is not an element of estoppel. No authority requires proof of all of the elements of estoppel and all of the elements of common law fraud in order to prevent

USLIFE from asserting the Statute of Frauds as a defense. Here, plaintiffs' evidence showed that Crosby refused to keep his oral promises to extend the fee agreement and this unconscionable behavior, together with plaintiffs' proof of the other elements of estoppel, should have caused the case to be submitted to the jury.

POINT II

EVEN ASSUMING THE CORRECTNESS OF THE DISTRICT COURT'S RULING ON SCIENTER, PLAINTIFFS PROVED INTENT TO DEFRAUD.

During their case-in-chief, plaintiffs presented evidence that Crosby made oral promises to extend the written fee agreements on four different occasions. The District Court assumed, as it was required to do for the purpose of the motion for a directed verdict, that plaintiffs' evidence of these promises to extend was correct. [JA at 137]. The Court was wrong, however, in concluding that plaintiffs' evidence did not show that Crosby intended to defraud them when he made those promises.

A party's misrepresentation of his state of mind or intent is sufficient proof of *scienter*, i.e., intent to deceive, under New York law. *Adams* v. *Gillig*, 199 N.Y. 314, 92 N.E. 670 (1910). Such a misrepresentation is established by proof that a party harbored the intention not to keep his promise at the time he made it. *Channel Master Corp.* v. *Aluminum Ltd.*, 4 N.Y.2d 403, 151 N.E.2d 844, 176 N.Y.S.2d 259 (1958); *Deyo* v. *Hudson*, 225 N.Y. 602, 122 N.E. 635 (1919); *Ritzwoller* v. *Lurie*, 225 N.Y. 464, 122 N.E. 634 (1919); *Bailey* v. *Diamond Int'l Corp.*, 47 App. Div.2d 363, 367 N.Y.S.2d 107 (3d Dep't 1975); *Elliman & Co.* v. *Lantzounis*, 30 Misc. 2d 550, 216 N.Y.S.2d 793 (Sup. Ct. N.Y. Co.), *aff'd mem.*, 14 App. Div. 2d 872, 222 N.Y.S.2d 683 (2d Dep't 1961). *Scienter* is also shown by proof that a promise was made without any belief about whether it would be kept or not.

Bank v. *Board of Educ.*, 305 N.Y. 119, 111 N.E.2d 238 (1953); *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 174 N.E. 441 (1931); *Terris* v *Cummiskey*, 11 App. Div.2d 259, 203 N.Y.S.2d 445 (3d Dep't 1960); *Goodman* v. *Title Guaranty & Trust Co.*, 11 App. Div.2d 1003, 206 N.Y.S.2d 32 (1st Dep't 1960); *Gould* v. *Flato*, 170 Misc. 378, 10 N.Y.S.2d 361 (Sup. Ct. N.Y. Co. 1938).

At trial, plaintiffs testified that Crosby made oral promises to extend on the following occasions: *First*, at the time the original fee agreement was executed on July 8, 1971, Crosby told Hawes that this agreement would be extended if he were still interested in acquiring All American on June 30, 1972, the expiration date of the agreement. *Second*, when the next written fee agreement was executed in June and July of 1972, Crosby again told Hawes that this agreement, which was to expire on December 31, 1972, would be extended if he continued to be interested in the transaction at the expiration date. *Third*, during a meeting on October 24, 1972, Crosby told Hawes that an extension of the fee agreement would be prepared after the beginning of 1973, if USLIFE were still interested in acquiring All American at that time. *Finally*, on May 30, 1973, Crosby called Rutherford to say that he had a proposal which might interest All American and to ask Rutherford to arrange a meeting between Crosby and Ballard. When Rutherford replied that the fee agreement should be brought up-to-date, Crosby responded, "No problem, no problem." [JA at 130-35].

The District Court found that plaintiffs had "failed to produce any evidence of Crosby's intention" at the time he made three of the promises at issue. [JA at 138, 140]. In the case of each of those promises, however, this finding is plainly wrong because the District Court (1) misconstrued the facts concerning Crosby's intention to renew the fee agreements when they were executed in 1971 and 1972, and (2) completely ignored the evidence of Crosby's

intent to defraud when he promised Rutherford he would "update" the agreement in May of 1973.

In that part of its opinion concerning Crosby's promises to extend at the times the agreements were executed, the Court concluded that Crosby's mental state was "perfectly consistent" with a "promise to reexamine the statute of the relationship at the end of the agreements.". As the Court said:

> ". . . In no way did Crosby promise to renew the agreements. At best, he promised only to reexamine the status of the defendant's acquisition plans at the expiration of each agreement and to extend the agreements if USLIFE were still interested. At trial, plaintiffs asked Crosby if he intended *to renew* the fee agreements when he made the oral promises; Crosby stated that he had formed no such intention one way or the other. Such a mental state, however, was perfectly consistent with Crosby's promise *to reexamine* the status of the relationship at the end of the agreements. Because of the nature of Crosby's promise, plaintiffs were required to produce evidence that at the time the promises were made Crosby either intended *not to reexamine* the status of the transaction or that he had formed *no* intention one way or the other on reexamining the status. . . ." [JA at 138-39, emphasis in original].

But there was no testimony whatever at trial about any promise to "reexamine the status of the relationship." Instead, the plaintiffs' evidence showed that Crosby promised to renew the agreement if he continued to be interested in the transaction at the expiration of each agreement. Crosby himself testified that on each of those occasions he had not formed any intention at all about a renewal. Crosby's testimony leaves no doubt that, when he made these promises, he had not considered renewing the agreement even if he were still interested in the acquisition on the termination date.

Thus, in his testimony about his discussion with Crosby at the time the July 8, 1971 fee agreement was executed, Ha es said:

> "Q. Now, was that agreement satisfactory to you? A. It was not.
>
> "Q. Why not? A. It had in it a termination date as of the end of the year of 1971. I said, 'What's this? I've never seen a termination date before. We're not used to that.'
>
> "And he said, 'Well, that's for your protection.' And I said 'I'm not sure I understand how that's so.' And we talked about that for a minute and he said, 'Well, if it will make you feel any better we'll make it a year.'
>
> "And I said, 'Well, I'm really not happy with that either, because this is a hundred million dollar acquisition, an acquisition of this type often takes years.' And he said, 'Well, if we're still interested at the end of that time we'll be very happy to extend it.'" [Trial Transcript at 53].

Crosby testified that he had not even considered renewing this original fee agreement upon its expiration:

> "Q. At this time you weren't thinking about extending the agreement in the future? A. Nothing to think of. We were starting negotiations and we had an agreement for that year. I made many acquisitions in three or four months.
>
> "Q. You weren't giving any consideration to an extension of the agreement? A. No.
>
> "Q. You didn't intend at this time to extend the agreement at sometime in the future? A. If I had I would have had an option for extension.
>
> "Q. The answer is no you didn't intend to extend the agreement in the future? A. I am not going to interpret the contract now. It says what it says.

"Q. I am asking what you were thinking, Mr. Crosby, I am not asking you to interpret the terms of the contract. A. I told you my total recall both this morning and this afternoon of the meeting of July 8 with Mr. Hawes.

"Q. At this time you didn't intend to extend the agreement when you signed it? A. I didn't intend or not intend.

"The Court: I think he testified it wasn't a matter that they considered one way or the other.

"Q. Is that correct, Mr. Crosby? A. I said the same thing with different words." [Trial Transcript at 401-02.]

Hawes also testified that Crosby promised to renew the June 26, 1972 fee agreement if he continued to be interested in the acquisition when that agreement expired:

"Q. What did you do after you received the draft [of the second fee agreement]? A. I went to see Mr. Rutherford. And I discussed with Mr. Rutherford the new copy, or the copy of the fee agreement extension that we had, and I particularly objected to two areas:

"Number one, one of the paragraphs had been rewritten so that instead of paying in cash, that USLIFE had the option to pay in common stock. In fact, unlettered common stock, which means that we could not easily sell it to receive our funds.

"Secondly, instead of being extended for a year, which was my understanding, it was—had been extended only until the end of the year, of 1972, and in discussing that with Mr. Rutherford at that time I pointed out that it would have been impossible and was impossible at that point for an agreement in principle to have been achieved by that time because All American was involved in another transaction which was not yet completed and would not be completed until the early winter or early spring of 1973.

"Therefore, this would be impossible. I then went back to Mr. Crosby, and told him and registered my two objections.

"After some discussion he agreed that he would pay the fee in cash. He said, but as far as the date on the fee extension agreement letter that we had let that stand, and we would see if he had continued interest in the company at the end of the year, and he would be glad to extend it just like he was this time, and said I worried too much, and to forget it. I then discussed another company and left the meeting." [Trial Transcript at 66-67].

Crosby gave the following testimony concerning his state of mind at the time the second fee agreement was executed:

"Q. Mr. Crosby, you entered into a second fee agreement, is that right, in June and July 1972? A. Let me help you, counsel. We are entering into all kinds of agreements all the time, investment agreements, consultant agreements, employment agreements, finder fee agreements, construction agreements, the vast majority of which have a terminal date.

"All parties to the agreement agree to the terminal date because everybody assumes it is a reasonable date. If it wasn't, you wouldn't enter into the agreement in the first instance.

"So I don't sit around cogitating if we don't do what the agreement says what are we going to do next. We will think about that when the time comes. We are talking about a year out.

"Q. So you didn't intend to extend the second agreement when you signed it? A. Sir?

"Q. You did not intend to extend the second agreement when you signed it? A. As in the case of the first one I didn't even consider it." [Trial Transcript at 403-04]

In short, the District Court's interpretation of the promises made by Crosby is flatly inconsistent with the plaintiffs' testimony about what was said on those occasions. Moreover, Crosby's own testimony about his state of mind is clear: he did not consider renewing the agreements even if he remained interested in the acquisition. The credibility of this testimony was for the jury, not the Court, to determine.

Even more crucial to the result below was the testimony concerning Crosby's promise to Rutherford in May of 1973 to "update" the fee agreement. This testimony left no room at all for interpretation by the Court. Inexplicably, however, the Court chose simply to ignore it.

Thus, Rutherford gave the following testimony about the May 1973 promise:

> "Q. Well, what did he [Crosby] say later? A. Well, on May 30th, he telephoned me from St. Louis, and said, 'Jim, I wish you would contact E. E. Ballard, see if I can see him at 4 o'clock this afternoon. I think I have worked out a proposition that they'll buy.'
>
> "And my reply was, 'Well, that's fine, Gordon, I'll be glad to call him, but if you think you've got a proposition they will buy, we ought to bring that fee agreement up to date.'
>
> "His reply was, 'No problem, no problem.'
>
> "Repeated those two words twice.
>
> "Q. And did you do what he asked you to do? A. I did." [Trial Transcript at 534.]

The District Court disregarded this promise because "No evidence was produced revealing Crosby's state of mind at that time. . . ." [JA at 140]. Yet Crosby clearly testified that he had no intention of renewing the fee agreement in May of 1973. In Crosby's words:

> "Q. At the time that you had those conversations with Mr. Rutherford, during the period from the end of May, say, through the time that the transaction was finally consummated, did you have any intention of renewing or extending the fee agreement? A. I did not, sir. The fee agreement expired the end of 1972. I had no intention of entering into a new agreement with anybody and I explained that to you in my testimony, I believe, yesterday morning." [JA at 64].

In sum, the inferences of the District Court improperly reject evidence submitted by the plaintiffs. According to the plaintiffs' evidence, Gordon Crosby promised to extend each fee agreement when it was executed; but by Crosby's own testimony, he did not at either time have an intention to extend the agreement being signed. Furthermore, according to Rutherford, Crosby subsequently promised Rutherford he would extend the fee agreement. Again by his own testimony, Crosby had no intention whatever of extending the agreement at the time of that conversation. The resolution of these issues should not have been withdrawn from the jury.

POINT III

THE JURY SHOULD HAVE BEEN PERMITTED TO CONSIDER PLAINTIFFS' EVIDENCE OF ESTOPPEL.

Although the District Court apparently viewed its ruling on the fraud question as dispositive of plaintiffs' claim, it went on to find that plaintiffs had failed to satisfy their burden of proof on two other elements. First, the Court ruled that plaintiffs failed to show that their acts were "unequivocally referable" to Crosby's oral promises. Second, according to the District Court, plaintiffs failed to establish that they had suffered "substantial injury" in reliance on those promises. The determination of the first issue, however, was for the jury; and the Court's ruling on the second question has no legal or factual basis.

"Unequivocally Referable". In its memorandum opinion, the District Court held that "plaintiffs must show that their acts of reliance upon the oral promise(s) were 'unequivocally referable' to such promise(s)." [JA at 140]. The requirement that a party's acts of reliance must be unequivocally referable to the oral promise on which he claims reliance arose out of the doctrine of part performance, where a party's unilateral performance of acts in reliance on an agreement takes that agreement out of the Statute of Frauds. In this case, however, plaintiffs claim that USLIFE is estopped from asserting the Statute of Frauds because its chairman, Crosby, made oral promises on which the plaintiffs specifically relied. *Compare Bakhshandeh* v. *American Cyanamid Co.*, 8 App. Div. 2d 35, 185 N.Y.S.2d 635 (1st Dep't 1959), *aff'd*, 8 N.Y.2d 981, 169 N.Ed.2d 188, 204 N.Y.S.2d 881 (1960) (part performance) *with Imperator Realty Co.* v. *Tull, supra* (estoppel). Even if this requirement is applicable in an action based on the principles of estoppel, the evidence presented by the plaintiffs at trial was sufficient to satisfy the requirement and the jury should have been permitted to consider that evidence.

In directing a verdict for defendant, the District Court found that plaintiff PS&Co. "performed all its acts during the time periods of the two written agreements; indeed, virtually all of the actions were taken during the first four months of the first agreement." Thus, according to the District Court, plaintiff PS&Co.'s "acts of reliance on the oral promises of July 1971 and June 1972 can, at best, be described only as *equivocally* referable to those promises." [JA at 141]. These findings ignore facts which were not disputed at trial and are based on inferences unfavorable to plaintiffs which only the jury could have drawn.

The sole business of a finder is to arrange an introduction that leads to a transaction. If the finder effects an

introduction but no transaction follows, he receives no fee. Under the fee agreements in this case, the "transaction", an agreement in principle leading to an acquisition, had to be consummated within a specified brief period of time; but both plaintiffs knew the transaction could not be consummated within the time specified. They had no incentive to render their services unless they could rely on Crosby's commitments to extend the fee agreements.

As shown above, Hawes testified at trial that he was not satisfied with the termination date because "an acquistion of this type often takes years." [Trial Transcript at 53.] He agreed to the termination date only after Crosby promised to extend the agreement if he continued to be interested in the acquisition. [*Id.*]. Similarly, Rutherford testified that, when the first fee agreement covering only one year was executed, he told Crosby the negotiations for the transaction would probably last two years. [Trial Transcript at 506.]

Moreover, it was undisputed at trial that both plaintiffs knew at the time they executed the second fee agreement that no transaction could be consummated between USLIFE and All American by the expiration date of that agreement. In the Pretrial Order filed in this action, the parties stipulated that the following facts were true:

> "35. On June 21, 1972, Hawes told Rutherford that the period of the draft agreement (requiring an agreement in principle by December 31, 1972) was too short and in Hawes' view the agreement should run for a year instead of six months. Despite his initial opposition to the length of the agreement, Hawes, acting on behalf of PS&Co., subsequently executed the new agreement with a December 31, 1972 termination.
>
> "36. On June 22, 1972, Ballard and Rutherford had a conversation in which Ballard informed Rutherford that he was not interested in an acquisition

> prior to the Spring of 1973, and then only if the stock of All American did not reach at least $18 per share. Despite his knowledge that Ballard believed no agreement in principle could be reached before the Spring of 1973, Rutherford subsequently executed the new agreement with a December 31, 1972 termination." [JA at 91].

In short, the plaintiffs had no motive for rendering their services after each of the fee agreements was executed other than the substantial fee itself and Crosby's oral promises to extend the written agreements.

In confronting Crosby's promise to Ruthereford in May of 1973 that he would "update" the fee agreement, the District Court found Rutherford had performed acts in furtherance of the acquisition after that date, but those acts could conceivably have been "referable" to situations other than Crosby's promise. In its opinion, the Court said:

> "Plaintiff Rutherford, however, performed acts in 1973 following the termination of the second written agreement. While it is conceivable that these acts be found 'referable' to one or more of Crosby's oral promises, particularly that of May 30, 1973, there is an equal likelihood that they referred to either of two additional situations. First, Rutherford was a substantial shareholder in All American and stood to profit from an acquisition of that company by USLIFE. Second, Rutherford testified that he was unconcerned about the termination date since, in a previous acquisition by USLIFE in which he had served as finder, Crosby had voluntarily extended the written agreement when the deal was not appropriately consummated before the expiration date of the original agreement." [JA at 141].

In reaching these conclusions, the District Court drew inferences which were unfavorable to the plaintiffs and plainly unreasonable.

Both Rutherford, testifying for himself, and Rodney Hawes, testifying for PS&Co., owned stock in All American. During the direct examination of Hawes, the District Court ruled that testimony concerning stock ownership by the plaintiffs in All American was not relevant to the question whether their services were "unequivocally referable" to Crosby's oral promises. In response to defendant's objection to a question to Hawes concerning the amount of the fee he expected to receive, the following colloquy occurred:

> "Mr. Beatie: Your Honor, on the point that the services have to be unequivocably referable there has been a lot of testimony about the fact that Mr. Hawes later purchased stock in All American.
>
> "The Court: Yes, go on.
>
> "Mr. Beatie: And the fee in this case was half a million dollars. Whatever he would have received as a premium on his stock was about $25,000.
>
> "Now, if you tell me that is not a problem, I don't care, but on the unequivocable referable point I want to be sure that the jury knows when he is performing a service, he is expecting a half-million dollars, not $25,000 on some stock that he bought later.
>
> "Mr. Miller: That is not the unequivocable referable point. It is referable to the oral agreement.
>
> "The Court: No.
>
> "Mr. Beatie: That's fine. Thank you." [Trial Transcript at 64-65].

The Court later ruled that evidence that Hawes made some profit on his All American stock would be admitted only on the issues of his credibility and a "duty of loyalty" defense which the Court subsequently struck from the case. [Trial Transcript at 90-92.]

Because of these rulings, there is no evidence in the record of what profit, if any, Rutherford may have made or expected from his ownership of All American stock as a result of the consummation of the acquisition. Even if there were such evidence in the record, at the very least

the jury should have been permitted to consider whether the amount of profit had any bearing on Rutherford's efforts to bring about a transaction which would have resulted in a million dollar fee.

Finally, Rutherford's testimony that Crosby had voluntarily extended the written agreement covering a prior transaction supports the plaintiffs' claims in this action. Rutherford testified as follows about this matter:

> "Q. Did you have any conversations about extending the date at all, other than the conversation you told us about on May 30, 1973? A. I don't worry too much about that, Mr. Miller, because in the Reliance Life case [the prior transaction to which the District Court referred], Gordon [Crosby] extended that contract of his own volition because he said that we could not close it within the time specified.
>
> "I had so much faith in the fellow that the dates didn't matter with me, so long as they were interested." [Trial Transcript 550-51].

In other words, Rutherford had no reason to doubt Crosby's word. Far from justifying a directed verdict against plaintiffs, this testimony actually demonstrates that Rutherford's reliance on Crosby's promise to "update" the fee agreement was reasonable and was the sole basis for his activities in May of 1973. This testimony should have been submitted to the jury.

"Substantial Injury". The final basis for the District Court's directed verdict in this action is its finding that plaintiffs failed to show they had suffered any "substantial injury" in reliance on Crosby's oral promises. But the Court's construction of both the law and the facts relating to this issue was wrong.

First of all, the authorities relied upon by the District Court do not support its conclusion that the services ren-

dered by the plaintiffs in this act... do not warrant their recovery. In *M. H. Metal Prod. Corp.* v. *April*, 251 N.Y. 146, 167 N.E. 201 (1929), for example, the New York Court of Appeals actually held that a person is estopped from asserting the Statute of Frauds as a defense where "by his agreement, acts and conduct, [he] has induced another to incur expense and alter his position to his damage." The Court said:

> ". . . Contracts which are within the Statute of Frauds cannot be changed or altered except in the manner which the statute requires in the first instance to make them enforceable. The guarantor may, however, by his agreement and conduct place himself in a position where he cannot avail himself of the defense. The statute does not protect one who by his agreement, acts and conduct, has induced another person to incur expense and alter his position to his damage. One cannot take advantage of his own wrong.
>
> "The defendant induced the plaintiff to change the construction of the jack, consented to the increase in price, and agreed to remain bound by his guarantee to the extent of eighty cents for each jack. He never notified the plaintiff of any change in his attitude, but induced the plaintiff to go on with the contract to manufacture the jacks relying on his guarantee. He cannot now alter his position and avail himself of the Statute of Frauds. The law will not permit him to take advantage of the statute when his unrevoked affirmative act causes the plaintiff to consent to the change in the contract. Parol evidence may be received to establish the fact that the change in the contract was induced by the affirmative act of the defendant. (*Imperator Realty Co.* v. *Tull*, 228 N.Y. 447.)." *Id.* at 150, 167 N.E. at 202.

Similarly, in *Triple Cities Constr. Co.* v. *Maryland Cas. Co.*, *supra*, also cited by the court below, the plaintiff took no action to enforce its lien based on defendant's represen-

tations that the controversy could be settled. In essence, plaintiff "did nothing", relying on representations by defendant which "lulled the plaintiff into inactivity." The New York Court of Appeals held the jury would have been permitted to find on this evidence that defendant was estopped from asserting the invalidity of the lien. The Court said:

> "When advised by opposing counsel that the settlement awaited only the determination of amount and that prompt payment would be made, the plaintiff and its attorneys were, the jury was entitled to infer, reasonably led to believe that for all practical purposes the matter was settled. Accordingly, they did —again reasonably, the jury was privileged to conclude--nothing.
>
> * * * *
>
> "From facts such as these, the jury was certainly warranted in finding that Maryland had from the start determined upon a course of conduct designed to lead the plaintiff to believe that it was not necessary for it to do anything with respect to its lien. Maryland was, of course, under no duty to instruct the plaintiff or its counsel as to the correct procedure to be followed. But, on the other hand, it was not privileged deliberately to divert attention from the lien, and the necessity to renew it, by negotiating for a settlement not to be consummated, by giving assurances that the only open question concerned a relatively insignificant item and by willfully prolonging negotiations until after expiration of the lien." 4 N.Y. 2d at 448-49, 176 N.Y.S. 2d at 295-96.

As these cases clearly show the performance of services in reliance on the oral change in the contract constitutes sufficient injury to estop the defendant from asserting the Statute of Frauds.

Finally, the District Court relied on *Bulkley* v. *Shaw, supra;* but as shown above, that case had nothing to do with estoppel based on oral representations. Instead, the court merely stated that plaintiff could not recover damages for fraud because he had failed to plead or prove any fraudulent statement.

More importantly, the District Court's view of the evidence on this issue was improper under the law governing directed verdicts. The Court found that "the only acts performed by PSCO with regard to the All American/ USLIFE transaction after the oral promise were the making of several phone calls and a trip to Chicago by Hawes", and that these acts "did not result in injury to PSCO" [JA at 143]. On the contrary, Hawes testified that he had numerous conversations about USLIFE with John W. Gardiner, President of All American, after each fee agreement was executed, although in 1971 Hawes and Crosby had agreed that Crosby should assume control of the meetings with Gardiner. [Trial Transcript at 180-81, 232, 244-53.] The jury, not the Court, should have determined whether Hawes had altered his position to his detriment in reliance on Crosby's oral promises.

Finally, the District Court conceded that Rutherford did "work on the transaction after the termination of the second fee agreement." [JA at 143]. In fact, the Court correctly found that the services rendered by Rutherford were extensive and that throughout the period from May of 1973 through the consummation of the acquisition in February of 1974 "Rutherford was actively working for the acquisition, talking with shareholders, directors and investment bankers." [JA at 135]. According to the District Court, however, "Rutherford suffered no substantial injury as a result of these activities other than the loss of a fee." [JA at 143].

But Rutherford not only lost his fee for the acquisition of All American by USLIFE, he also gave up the opportunity to seek another purchaser for a company whose chairman he had known for many years. If Crosby had told Rutherford in May of 1973 that the fee agreement would not be "updated" in return for Rutherford's further assistance, reasonable men could easily conclude that Rutherford would have ceased any efforts on USLIFE's behalf. In the case at hand, however, the jury was not afforded the opportunity to draw this conclusion when the District Court improperly withdrew the case from their consideration.

In substance, each plaintiff arranged an introduction which resulted in USLIFE's acquisition of All American: Rutherford introducing Crosby to Ballard and Hawes, on behalf of PS&Co., introducing Crosby to Gardiner. Both plaintiffs arranged these introductions and performed additional services despite the fact that they knew the transaction could not be consummated before each fee agreement expired. Instead, they performed their services in reliance on Crosby's promises to extend those agreements. If the District Court should have drawn any inference from these facts, it would be that plaintiffs would not have continued to work for this acquisition had Crosby told them they would not be paid.

Conclusion

In sum, the plaintiffs' evidence at trial showed that they rendered valuable services leading to the acquisition of All American by defendant USLIFE. By rendering these services, plaintiffs performed all that was required of them under each of the written fee agreements. Each plaintiff

knew, however, that no transaction could be consummated within the time specified in the written agreements but performed his end of the bargain in reliance on Crosby's oral promises to extend those agreements. The evidence also showed that Crosby's promises were fraudulent when he made them, even though the District Court's requirement that plaintiffs prove *scienter* in this contract action was erroneous. The Court, however, apparently chose either to ignore or to disbelieve crucial parts of the plaintiffs' case, thus violating the principles by which a motion for a directed verdict must be judged and depriving plaintiffs of their right to a trial by jury. For the reasons shown above, the judgment of the District Court directing a verdict and the entry of judgment for defendant should be reversed and this action remanded for a new trial.

Respectfully submitted,

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STATUTE

New York General Obligations Law

§ 5-701. Agreements required to be in writing.

Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

* * * *

10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman. As amended L.1964, c. 561, eff. Sept. 27, 1964.

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